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CONCENTRATION OF POWER SALVAGED: CORONAVIRUS STOCKTAKING

Assessing the Crisis Management of the Hungarian Government from the Perspective of Constitutional Law

Introduction

This analysis provides an overview of the often-disputed crisis management mechanism of the System of National Cooperation and the steps aimed at the concentration of power disguised as crisis management by introducing the key legislative and consequent public law decisions. We do not formulate hypotheses or interpretations of reality but take stock of events and their consequences. The analysis reveals the actual political objectives behind the decision on the special legal order declared without any political or social discussion, the resulting series of actions, which both individually and as a group provide insights into the operation of the system and reveal its character.

The story has multiple layers. There were some reasonable, right decisions justified by the pandemic and based on international experience. These, however, could have all been made without the introduction of the special legal order, within the already existing constitutional framework, with more moderate restrictive provisions already present in the Health Act which also restrict civil liberties but consider necessity and proportionality requirements as well, moreover, instead of the introduction of a special legal order, with the application of some legislative amendments passed under the regular operation of the Parliament and without a rule by decree radically suspending civil liberties. The fact that in any authoritarian system the constitutional rights in general apply within limits does not mean that their declared suspension would not cause severe infringements even compared to the previous legal situation.

Such a period clearly highlights the differences between statesmen/stateswomen and politicians looking for their own political gain. During times of crises, the former group only protects people in danger and the civic-national community, while the latter continues to look for opportunities of power, primarily their own political (an in an even worse case business) gain.

At the same time, it would probably be a mistake to talk about the changed nature, new state of existence of the System of National Cooperation in connection with the introduction of the special legal order. The essence of the system did not change at the time of the state of emergency ("state of danger") either, its endeavors to be on the offensive permanently, for continuous internal conquest, first quarantining, then annihilating the leftovers of autonomy have already been familiar. This has not changed. And as the search for autonomy represents an essential feature of human nature, there are always new areas to look for because the disappearance of provinces to be conquered would threaten the very existence of the system.

Introduction of the special legal order: ordering a state of emergency without justification enabling the limitation of a wide scope of fundamental rights

The government declared a state of emergency (a "state of danger" technically) on March 11, 2020 [Government decree no. 40/2020. (III. 11.) on the declaration of a state of emergency], and thus for the first time since the change of regime, a special legal order took effect for the entire country. In the hours preceding the decision about introduction, the Eötvös Károly Institute published a short statement in which we called readers' attention that the government must justify why it was necessary to introduce a special legal order enabling the restriction of a wide spectrum of fundamental rights beyond the declaration of epidemiological measures. In the case of an epidemic, based on Act CLIV of 1997 on Health (Health Act) the government has broad powers already. In line with the stipulations of the act, it is (would have been) possible even without the declaration of a special legal order, for example, to restrict the freedom of movement of the people, isolate patients and order a quarantine (epidemiological control, monitoring, lockdown), close down areas, prohibit public events, restrict or suspend the operation of schools, universities, and/or any other activity that may "promote the spreading of the epidemic" [Health Act Article 74, Section (2), point a]. If we look at those government decisions of the past three months which were made specifically for the purposes of fighting the virus (from travel restrictions through store closures to mandatory mask wearing), we can barely find any which could not have been made based on the Health Act, and especially the "other epidemiological actions" specified in Article 74, Section (2). Finally, the government exposed itself. In our March 27 statement we showed that the chief medical officer, in consideration of the fact that the emergency measures ordered by the government expired, on March 26 based on the authority granted to her by the Health Act prohibited the visiting of higher education institutions by students by means of a normative resolution, along with the entry into the territory of Hungary of railway vehicles, buses and civil aircraft engaged in international passenger transport, as well as non-Hungarian citizens arriving from abroad. Of course, such a "grain of sand in the machinery" does not embarrass the government. What is more, our fear that we had voiced already when the state of emergency was declared was reinforced several times. On March 11 we wrote the following: "The special legal order would

enable to Government to restrict even those rights of individuals by decree that are not directly connected to the management of the epidemiological situation. In the case of a special legal order, for example, freedom of expression may be limited as seen fit by the government, limiting information flow, contacts with family members, and getting information about the epidemiological situation. The restriction of these rights is not only unnecessary but it also hinders the effective fight against the pandemic (in which all citizens should participate)." Let us add that at the time of writing these lines there was no mention yet of the Enabling Act.

Enabling Act: introduction of a rule by decree without limits

Bill no. T/9790. on the fight against the coronavirus, referred to by the public only as the "Enabling Act" was submitted on March 20 and the Parliament voted on it on March 30. In its statement published on March 22, the Eötvös Károly Institute already called attention to the fact that the bill did not limit government actions in any way, thus the condition relying on the special legal order might be maintained indefinitely. The ambiguously worded legal provisions [especially the relationship of Article 3 and 8 on the revocation and expiry of the Enabling Act with Article 54 of the Fundamental Law] and the misleading government communication together gave the impression that the authorization for ruling by decree granted by the Parliament may at any time be revoked by the Parliament. In our analysis published on March 31, 2020 we pointed out that this was a clear distortion: the decision on the termination of the state of emergency (in line with subsection (3) of Article 54 of the Fundamental Law) falls within the exclusive competence of the government, similarly to the determination of the end of the state of emergency. The determination of the end of the state of emergency by the government and based on this its decision on the termination of the state of emergency represent a prerequisite to the expiry of the Enabling Act (see Article 8 of the Act). Although according to the government every "brave person" had to vote in favor of the Enabling Act because "Parliament sessions may be suspended due to the human pandemic", the Parliament was in session throughout, what is more, it met in such a way that it could adopt a myriad of such amendments serving the interests of those in power that could not be associated with fighting the pandemic in any way. Even though the introduction of the special legal order together with the Enabling Act provided the opportunity for unlimited rule by decree, in certain issues the government continued to use the well-established law factory, the Parliament as legislator. The special legal order was probably motivated by the fear of losing the two-third government majority that became especially fragile at the time of the pandemic. The Enabling Act served much more as a guarantee of power then as an epidemiological measure. In the following, we provide an overview of what we are left with now, after returning the special authorization and what the Orbán regime actually used the special legal order and unprecedented mandate for.

- **Disregard for human dignity**

The case of Iranian students

The first registered infected people were university students from Iran. The affected people and those in contact with them were isolated in Szent László Hospital. According to the government media, the Iranian students behaved violently during the hospital quarantine and they also violated quarantine rules. The government was quick to take the opportunity and emphasized the link between coronavirus and illegal immigration. The suffering of the Iranian students, however, did not end. Criminal proceedings were instituted against the students for violating the epidemiological rules and based on the recommendation of the police, the immigration authority expelled them from the country. The action against the expulsion decision was rejected by the Budapest-Capital Regional Court. It indicates the arbitrary action of public bodies and the influence of government propaganda that expulsion took place without the authorities clarifying what exactly happened at the hospital, what the responsibility of the affected people was, and what the reason was for expelling them from the territory of Hungary and the European Union prior to the end of criminal proceedings.

Freeing up hospital beds by ministerial instruction

On March 17 Miklós Kásler, Minister of Human Capacities, ordered in secret that 60% of hospital beds should be freed up, by ministerial order and with reference to the coronavirus pandemic. As a result, masses of ill people had to leave the healthcare institutions providing care for them. As we pointed out in our statement published on April 25, such a measure limits the most fundamental rights of people and thus it has to be in line with the strictest constitutional criteria. A ministerial instruction is a normative instruction according to Act CXXX of 2020 on Law-Making (Act on Law-Making), a regulatory instrument of public law that does not qualify as a law. By means of a normative instruction, the minister may regulate the organization, operation or activities of bodies falling under their management, control or supervision [Act on Law-Making Article 23, Section (4)]. Although the exact content of the ministerial instruction on freeing up the hospital beds was not made public (despite the request of data of public interest by the Helsinki Committee), as a result of those included in it the fundamental rights of thousands could be infringed; the public could also get detailed information about certain cases. The Fundamental Law stipulates that rules related to fundamental rights and obligations shall be laid down in an Act [First sentence of Article I, Section (3) of the Fundamental Law]. According to the Constitutional Court, to regulate indirect and distant relations with the fundamental rights a regulation level lower than that of an act could be enough, but it may, however, not include provisions regarding the regulation of the fundamental right or its substantial content [Constitutional Court resolution no. 64/1991. (XII. 17.) Constitutional Court resolution no. 34/1994. (VI. 24.)]. Logically, the instruction that addresses only specific addressees, not qualifying as a law, i.e., including non-obligatory rules of behavior can by no means be used as a regulation for fundamental rights, not even at the time of special legal order.

Based on all this, there is no doubt that to order the freeing up of hospital beds to an unparalleled degree, thus to make a provision directly affecting the right to life, human dignity or healthcare under normal circumstances legislative, at the time of a special legal order regulatory authorization would be needed. Thus to order the removal of patients this way was clearly against the Fundamental Law. The case was also politically inconvenient for the government, which is well illustrated by the fact that subsequently Miklós Kásler attempted to devolve responsibility to the physicians for deaths that resulted from freeing up of hospitals ordered by him and he claimed such nonsense that the opposition was attacking the measures ordered by him because he (i.e., the minister) "is an open believer and Hungarian man"(!).

The amendment of the Act on Civil Registration Procedure, based on which gender cannot legally be changed anymore in Hungary

In the midst of the pandemic, the government felt it was time to amend Act I of 2010 on Civil Registration, with which they made gender at the time of birth unchangeable in the civil registers. According to amendment no. T/9934. written based on "the broadest possible consensus, regardless of political boundaries", submitted as part of an omnibus bill and ratified on May 19 the sex at the time of birth will replace the gender included in the register of personal identification data, which shall not be modifiable, i.e., from this point on the state acknowledges and registers only the biological sex of a given person. The amendment represents an open attack against the rights of transgender and intersex people, it violates fundamental constitutional rights, goes against the case law of the European Court of Human Rights (Christine Goodwin v. the United Kingdom): it clearly violates the right to human dignity and the respect for private and family life.

Rejection of the ratification of the Istanbul Convention

On May 5, probably as an essential part of the fight against the epidemic, the Parliament also voted for the rejection of the ratification of the Istanbul Convention. Political statement no. 2/2020. (V.5.) of the Parliament on the importance of the protection of children and women and the rejection of joining the Istanbul Convention calls on the government not to take further steps towards the recognition of the binding effect of the Convention and to represent a position also in the institutions of the European Union that the EU should not join the convention. It is revealed clearly by the absolutely absurd wording of the statement in 21st-century Europe that certain provisions of the Istanbul Convention go completely against the migration policies of the government, what is more, the governing parties do not wish to make either the concept of gender or the "gender ideology of the convention" a part of Hungarian law. The theme of gender ideology has been used by the government for years with fondness, let it concern the banning of a university major they do not like or demanding the prohibition of gay parades. This political statement is a symbolic manifestation of the hate campaign that the Hungarian government has been conducting since 2015 against refugees, civil organizations, the EU, the UN and everyone

else who dare to criticize their policies. The fact that it was adopted in the midst of the coronavirus epidemic, when due to the instruction of the minister thousands of people were sent home from hospitals, stands as witness to infinite cynicism and the total rejection of humaneness.

- **Punishing the expression of opinion**

Introduction and practice of epidemiological scaremongering

One of the roughest government steps taken during the state of emergency certainly involved the modification of the scaremongering provisions of the Criminal Code (although of course it was not the first time that the Orbán government resorted to criminal law threats to suppress opinions it does not like). The bill expanded the definition of scaremongering (Article 337 of the Criminal Code) with a new basic case. Based on this, *"those who, during a period of special legal order, claim or spread in public false information or true information in a distorted manner in such a way as to obstruct or prevent the effectiveness of protection shall be punished by imprisonment for a term of one to five years."*

This amendment of the Criminal Code was criticized heavily by the profession from the beginning. Already in our opinion published on March 22 we claimed that this definition, for example, with the elastic concept of the "effectiveness of protection", the specification of the criterion of "suitability" of its "obstruction" or "prevention" raises serious concerns about rule of law. And at this time we only suspected and we could not be sure that the new definition of "epidemiological scaremongering" will actually be used for the intimidation of citizens. We also called attention that although based on the former practice of the Constitutional Court it is clear that objective information, the true statement of facts cannot be punished even if it disturbs public peace [Constitutional Court resolution no. 18/2000. (VI. 6.)], such a criminal law regulation that does not meet the requirements of the clarity of norms, which does not clarify the professional-deliberation factors necessary for the judging of particular cases, is in itself suitable for complicating the work of and intimidating journalists reporting on the coronavirus and civil organizations monitoring the operation of the state during the pandemic and special legal order. In our statement we highlighted that the new regulation could pose a threat to the freedom of speech of law-abiding citizens active on social media sites. Life has confirmed such a fear multiple times. According to the news, more than 100 procedures were initiated due to epidemiological scaremongering during the special legal order. In the two cases receiving most attention (in the case of a citizen living next to Szerencs and one in Gyula) criminal proceedings started because of Facebook posts that were critical of the government, without any foundation, involving early morning searches, seizing computers and taking people in for questioning. We might as well ask what the point of all this was, how those in power may benefit from such measures that recall the practices of the darkest dictatorships. We might find the answer in the play of István Örkény written about the Rajk trial titled *Forgatókönyv* [Screenplay]: "...so that

those who are not yet afraid shall begin to be afraid, and those who already are, shall fear even more."

The new specification of scaremongering in the Criminal Code was attacked by a petitioner at the Constitutional Court. However, the court in its resolution published on June 17, 2020 rejected the complaint and stated that the *"concerns raised were unfounded"* (paragraph [58]). Being familiar with the above actions by the authorities, it would be hard to accept the conclusion of the resolution, which was also happily emphasized by the government at international forums, according to which *"[the] prohibition thus applies only to knowingly untrue (or distorted) statements of fact, and not to critical opinions"* (paragraph [48]). The reaction of state bodies is a good example for the general weakness of institutional protection of fundamental rights and how much we can trust the theoretically independent constitutional institutions when the political power severely intervenes in the freedom of the individual.

Punishment of the "honking protesters"

Ákos Hadházy independent MP organized car demonstrations to Clark Ádám Square from the middle of April, to the area under the study of the Prime Minister in the Carmelite monastery, asking the protesters to turn towards the square, drive one round in the roundabout and honk, thus expressing their opinion about the politics of the government in general and the measures aimed at freeing up of hospitals in particular. After the second demonstration news about protesters being fined came continuously, with fines amounting to HUF 1.2 million by the police. The demonstrations did not take place based on the Assembly Act as in line with the legal stipulations under the special legal order no announced assemblies could be organized (or it was not possible to assemble as such) at that time. Car demonstrations, however, represent such a unique form of expression during which the protesters stay in/on vehicles, are not in contact with one another, and express their opinion by honking. The protesters were fined due to the infringement of the rule of the Highway Code which states that in a populated area a sound signal may only be given if there is a danger of an accident, in order to prevent such accident. The lawfulness of such fines is strongly disputable from a constitutional perspective. In these cases honking is symbolic speech, a form of expressing one's opinion (what is more, during a pandemic almost the only possible form), and the right to expressing one's opinion represents such a fundamental right that may be limited only in exceptional cases, and only for the enforcement of other fundamental rights and in a necessary and proportionate manner. Even if public interest in the safety of traffic would have been infringed to any extent due to cars honking (based on news it was not), if honking which was used to express an opinion really would have endangered the safety of other participants of traffic (we are not aware of such cases), it would still be questionable whether the people expressing their opinion by honking their cars or ringing from their bikes could still be fined or not. What is more, in any offense procedure the danger of the action for society should also be assessed. The use of the horn of a car or ring of a bicycle to express an opinion does not appear to be such an action that could be

dangerous for society, not even from the perspective of the spreading of the virus. Those decisions of the court are also known in which they acquitted such participants leaving a demonstration who were fined because of infringing the Highway Code by not walking on the sidewalk (for example, see decisions no. 3.Szk.17.812/2018/2., 12.Szk.14.532/2018/6., 3.Szk749/2019/.3. of the Pest Central District Court).

The police action and fines against the peacefully honking protesters is especially outrageous in light of the completely different treatment by the authorities of the neo-Nazi event held on the pretext of the recent double murder at Deák Square and despite the legal prohibition. As it is widely known, on May 28 extreme right wing organizations held a racist demonstration at Deák Square which the police instead of dissolving it, actually protected. It seems that according to the police the protesters honking in their cars while driving in line with the rules are more dangerous for society than the neo-Nazis holding pyrotechnic devices lit in the middle of the roadway and shouting "gypsy crime". Authorities, however, take measures that are unacceptable both professionally and morally not in a vacuum but in an environment that is characterized by increasing racism built consciously by the government and an intensified dislike of several vulnerable groups. The Prime Minister, who wrapped his opinion at the beginning of the year on the payment of damages awarded to Roma children from Gyöngyöspata due to the segregation they had to suffer into a racist statement, now in connection with the event organized by far-right groups originally to the building of the Roma Self-Government at Deák Square, later held a few meters further with police protection despite the clear prohibition by the authorities commented the following: *"Although we caught the perpetrators immediately, this does not give their life back. Yesterday there was a demonstration in connection with this."* Thus the Prime Minster implies that a demonstration with racist symbols and slogans and prohibited by law is a justifiable reaction by citizens. Viktor Orbán goes against not only fundamental human, moral norms but he also questions the basics of the legal order fitted to his own interest of power after 2010, the exclusivity of the state's monopoly of violence, and he uses far-right groups consciously. It is not the first time, however, that the vision of an anomic society appears: a power that transcends its own rules is also perceivable in the state of emergency caused by mass immigration maintained for years, the eternal secrecy of those mentioned at government meetings or the troubles outsourced to brigades of violence consisting of football hooligans aimed at silencing voices inconvenient for the government. It seems that those in power now clearly calculate the political costs of gestures taken to the far right now as political capital, which may push the country into an even deeper moral crisis, especially in view of the fact that the state's hate campaigns funded from billions of Forints have already increased the exclusionary attitudes of the majority society to unprecedented heights.

- **Destruction of information rights**

No need for freedom of information in a state of emergency

In Hungary, as opposed to all other European countries it was not revealed for a long time in which part of the country coronavirus infected patients were identified. Where are the regional epidemiological data? - asked the journalists after the establishment of the operational group. Chief medical officer Cecília Müller, while epidemiological data are clearly aggregates (totals that may not be associated with the individuals), i.e., not personal data, claimed that these data were kept secret due to the protection of personal data. The same question was asked at the information session of the Government. Gergely Gulyás, the minister heading the Prime Minister's Office, answered that the position of the operational group was clear: no panic should be caused at the settlements (they obviously did not agree on the justification of such confidentiality). This is a constitutional scandal.

The brutal devastation of rights continued by issuing statutory decree no. 179/2020.(V.4.). Based on this decree, a public body, instead of the previous main rule of 15 days, has 2x45 days to provide data of public interest if *it is probable (!)* that such data is related to its public duties performed in connection with the state of emergency. Thus the time limit for providing information is extended to three months and people may go to court only afterwards. This does not only represent a limitation of freedom of information but also its termination for the period of the special legal order (especially in its function associated with freedom of the press).

Below are a few examples in which the social control of those in power (which was already faltering) collapses:

The currently ongoing brutal plundering of local governments. The government took away more than one billion Forints only from the 8th district headed by an opposition mayor (see below). The reasons for this, as the action is probably related to public duties associated with the state of emergency, cannot be known from this point on.

The Cabinet Office of the Prime Minister responsible for government communication spends another six billion Forints on providing government information. As this is probably related to public duties associated with the state of emergency, the details of such spending may be kept confidential for three months.

They spend an inconceivable amount of six hundred billion Forints (!) on restarting tourism and as this is likely to be related to the public duties associated with the state of emergency, details of the spending can be kept confidential for three months.

According to news reports on April 7, HUF 450 billion is spent on creating jobs and as this is likely to be related to the public duties associated with the state of emergency, details of the spending can be kept confidential for three months.

As already noted above and as part of the double talk related to the scale and reasons for reducing the number of hospital beds, on March 17 Miklós Kásler, Minister of Human Capacities, ordered 60% of hospital beds freed up in secret, by ministerial instruction and not by decree with reference to the coronavirus pandemic. What is more, Kásler's severely

unconstitutional instruction even prohibited hospitals from making statements about the reduction of the number of beds. The minister later denied this.

As we have noted above, as the ministerial instruction about freeing up hospital beds was not made public, the Helsinki Committee turned to the ministry with a request for data of public interest, which was rejected by Kásler's ministry by claiming that it represented data on which a decision is based: "I would like to inform you that the document requested by you also serves as a foundation for future decisions, thus your request... is rejected. Budapest, May 8, 2020. Best regards: Ministry of Human Capacities". All this while the instruction is not the foundation for decisions but the decision itself!

In government communication which cannot be considered proper information there were staggering differences (of 6,000 beds) even about the scale of reductions in hospital beds. The difference of data published in connection with patients who were forced to leave the hospitals was even higher. Gergely Gulyás himself noted later on that the expulsion of thousands of patients from hospitals was not justified by the pandemic: "The socialist government committed many crimes in healthcare but the reduction of beds or the specification of the number of beds is a question to be answered by the medical profession." When asked why the freedom of information had to be demolished for the time of the pandemic that no one knows the end of, Minister Gulyás answered that the requests for data of public interest related to the reduction of hospital beds made the Hungarian government really sad: "it is sad to see that while the hospitals are occupied with fighting the pandemic, many requested data of public interest from them in masses."

Bill no. T/9927. adopted on May 19 on the development, implementation, and financing of the Hungarian section of the reconstruction investment of the Budapest-Belgrade railway line represents another ominous development, which excluded the public for ten years from the data of public interest related to the most expensive railway construction in history. (The submitted bill was more destructive than what was accepted in the sense that the word "if" at the beginning of the sentence and creating a conditional structure was missing from it). "If the disclosure of the data contained in the contract concluded in connection with the Investment and in the documents related to the preparation and conclusion of the contract endangers Hungary's foreign policy and foreign economic interests being free from unauthorized external influences, the request for their disclosure shall be refused for ten years from the time of the generation of such data."

No need for private sphere in a state of emergency

After refusing to provide regional statistics, the operational group published the list of those who died from the pandemic, in a way that enables personal identification (there were several cases when identification actually took place in public), together with their sensitive data related to their medical history.

Simultaneously with this story, the statutory decree of the government also appeared according to which László Palkovics, Minister of Technology has unlimited access to databases also containing personal data of citizens.

According to Government decree no. 46/2020. (III. 16.) :

"Article 10, Section (1) The Minister responsible for innovation and technology, as a member of the Government responsible for science policies and informatics, shall be entitled to get to know and manage any available data to be able to prevent and eliminate the consequences of a human epidemic causing mass illnesses endangering the safety of life and property, protect the health and life of Hungarian citizens, model and analyze the spread of the epidemic.

Section (2) In order to perform their duties, the Minister responsible for innovation and technology shall be be supported by state and local government bodies, economic organizations and individuals, and provide the requested data."

Based on Government decree no. 83/2020. (IV.3.), the operational group, also with reference to protection, can get to know and manage sensitive data of a tremendous amount managed by the patient care and public health administration and available in the Electronic Health Service Space.

According to statutory decree no. 179/2020. (V.4.), during the period of special legal order, before the start of data processing, there is no prior information about the processing of our data, our right to exercise the right of access, rectification, supplementation, right to restrict data processing and deletion of data has ceased, along with the right to be forgotten, the right to restrict data processing, the right to data portability, protest, and the rights that control data controllers related to automated decision-making and profiling. These are mostly rights set out in the general data protection regulation of the European Union that are directly binding for everyone. It remains a mystery based on what legal ground the government suspended these without a time limit. In any case, offering a challenge for the courts, the application of directly applicable EU law was expressly prohibited by a statutory decree of the Hungarian government. According to the European Union Data Protection Regulation, restrictions on these rights by Member States can only be allowed if the restriction by the Member State respects the essential content of fundamental rights and freedoms and it represents a necessary and proportionate measure in a democratic society. It may be disputed what the essential content of individual rights enjoyed by citizens is, it is beyond dispute, however, that total removal is contrary to European Union law and it may never qualify as a necessary and proportionate measure in a democratic society. Thus if such a case reaches a Hungarian court, then they either boldly set aside the statutory government decree that violates EU law, initiate a preliminary ruling procedure, or turn to the Constitutional Court; at the same time, due to the regulation in question, even EU infringement proceedings may be initiated against Hungary.

Based on the new omnibus act adopted on May 19 on the amendment of certain acts strengthening (!?) the safety of citizens, the Counter-Terrorism Information and Crime Analysis

Center, which is part of the institutional system of national security, now has access to *all information* falling under the competence of the cooperating bodies for the purpose of detecting cybercrime: i.e., the total data assets of bodies set up to carry out police tasks, those carrying out internal crime prevention and detection tasks, combatting terrorism, the National Tax and Customs Administration, the civil national security services, the Military National Security Service, the immigration authority, the refugee authority, the body responsible for citizenship procedures, the central prison body, criminal records authority, the disaster management body and the central body responsible for the registration of citizens' personal data and addresses (there are hardly any institutions left out). From this point on, it can monitor the traffic on electronic communication networks, which means that with the exception of the content of communication, it can also get to know traffic data, including millions of personal data, which represents a gold mine for data mining. These are truly scary news. (Compared to this it seems marginal that with the amendment of the Police Act, the forensically important characteristics of persons questioned on the basis of a well-founded suspicion of an intentional criminal offense will be kept for twenty-five years, but this information will also be stored for twenty years even if the suspect does not prove guilty.)

The amendment made in response to cyber attacks is of equal weight, which modifies the Act on Information Security: According to this, the authority may in a resolution order the temporary inaccessibility of data transmitted via electronic communication networks or other information society services that pose a threat to the security of Hungarian cyberspace or infringe, threaten national defense or allied interests or represent a threat to the security of electronic information systems used for defense purposes. The temporary inaccessibility of data may be ordered by the authority for a maximum of 90 days, which in justified cases may be extended with 90 days.

Cyber attacks are truly existing threats and it is absolutely justified to implement safety measures against them. However, under the rule of law this should not take place the way it does here. No one can receive unlimited authorization under the rule of law for anything, there is no uncontrollable power under the rule of law. The constitutional state is always distrustful of those in power. This is the reason why there are working mechanisms for checks and balances in every rule-of-law country.

The characteristic of an authoritarian state, however, is that the lowly must be monitored, controlled, but the mighty have to be trusted, they are usually controlled only from the top of the hierarchy, and mostly to check if they try to take the sovereign's place. By now the institutional bodies of control have become empty, the independent supervisory bodies have been abolished or domesticated, and although, in accordance with international practice, the national security committee of the Parliament is chaired by an opposition politician, the body has practically not been involved in substantial work for a long time.

Uncontrollable powers can easily be used to severely restrict privacy rights, personal security, freedom of speech, freedom of commercial speech, or even property rights. If any online

content or service is made inaccessible, the injured party can at most go to court, but this is of no use either, the procedure probably lasting for several years is obviously not a solution in this situation.

We hereby summarize the main points of the statement by the European Data Protection Supervisor (EDPS) calling for data protection at the time of the epidemic, which is also available on the website of NAIH (National Authority for Data Protection and Freedom of Information). *According to the European Data Protection Supervisor, the controller must ensure the protection of the personal data of data subjects during these special times as well. Therefore, a number of factors need to be taken into account in order to guarantee the lawful processing of personal data, and in any case it should be kept in mind that measures taken in this context must respect and not be contrary to general principles. An emergency is a legal condition which may legitimize a restriction on the freedom of individuals, provided that such restrictions are proportionate and limited to the duration of the emergency. It is important to put in place and adopt appropriate security measures and confidentiality policies to prevent personal data from being made available to unauthorized persons. Respect for data protection principles must be subject to increased controls and safeguards.*

- **Local Governments Undermined**

The success of the democratic opposition at the local government elections last year clearly put the significance of local governments into an entirely different light. The fact that in Budapest and in several significant cities outside the capital the opposition took leading positions or at least formed a majority also increased the opportunity for a change of government. In its statement published before the local elections, EKINT discussed in detail the elimination of local government autonomy after 2010, introducing how the local governments became a part of the state organizational system completely subordinated to the government, operated centrally, with a limited autonomy and curbed scope of tasks and competences. In October 2019 we defined the political mission of opposition local governments that had limited room for action due to the autocratic context in a way that "it should be a bit better to live under democratic local governments than under the rule of the local power kept on the leash of the National System of Cooperation!" Leading the settlements headed by the democratic opposition with the remaining legal, administrative, financial decision-making powers in a transparent way, with the involvement of the community, in line with the principles of the rule of law and in a humane way is strikingly different from the practice of the National System of Cooperation. It is not by chance that the current leadership is terrified of local autonomy, as this difference may potentially serve as a model. While all over the world in the past few months the local governments of settlements playing a key role in the fight against the pandemic received significant resources from the central government, the Hungarian government took several

steps during the state of emergency which were aimed at further undermining the local governments. We provide an overview of the most significant ones below.

"Creative" mayors of the governing party: The case of Komló, Szekszárd and Mezőtúr with the powers delegated to mayors

The declaration of a state of emergency provided mayors with full local powers in line with the Disaster Protection Act as it conferred the decisions of the board/general assembly and their delegated decisions to the mayors [Act CXXVIII of 2011., Article 46, Section (4)]. Some mayors from the governing party immediately abused the opportunity. The mayor of Szekszárd, exercising the powers of the general assembly, accepted the decree on the city's budget alone, without discussion with the opposition, decided on his own about the amendment of the organizational and operational rules, the restoration of the mayor's cabinet, and also took over the publication of the city's weekly from the asset manager. The mayor of Komló also accepted the 2020 budget of the city alone, and without any consultation decided to suspend the payment of the honoraria of the representative body with an opposition majority until the end of the state of emergency. The mayor of Mezőtúr exploited the authorization received due to the state of emergency and appointed a deputy mayor from the governing party despite the fact that in the representative body there is an equal proportion of governing-party and opposition representatives, due to which no agreement had been made about the position since October. There was, however, such a democratic-minded mayor from the opposition who escaped from the extra powers delegated in a way that the online voting for representatives was organized distantly, and with the approval of the faction leaders an individual decision-making practice was developed not only aimed at a majority but occasionally also a consensus.

"The broadest possible cooperation, regardless of party politics": a withdrawn amendment on the "defense committee" guarding municipal decisions

The government submitted bill no. T/9934. on March 31, a so called omnibus act (we refer to it as a pigwash act), Article 36 of which would have represented a severe attack on the remaining authority of the local governments. The section of the bill affecting the local governments and resulting in widespread outrage, obviously considering the political costs of the case, was withdrawn on April 1, as Minister Gergely Gulyás stated, in the spirit of the "broadest possible cooperation regardless of party politics". According to Article 36 of the submitted bill, the preliminary approval of the county and capital defense committee would have been needed for the decisions of the mayor of Budapest, the mayors, and the chairperson of the county assembly (made under their extra powers granted from the above-mentioned authorization). Based on the amendment, the county, capital defense committee would have been obligated to make a decision about the preliminary approval within 5 days after the receipt of the proposed decision and if the defense committee did not decide, the decision of the mayor would have become effective with a delay of five days. As we have also explained in our

statement published on April 2 about the bill, the proposal causing significant outrage was a perfect example for the pointless centralization of decisions, which carries in itself the danger for incomplete, unprofessional decisions, moreover, the hindrance of rapid reactions justified at the time of a crisis. At the same time, the other parts of the bill were adopted by the parliament: under the battle cry of "the broadest possible cooperation regardless of party politics", the government found it at the height of the coronavirus pandemic that it was time to subordinate municipal-run theaters to government-influenced supervisory committees (see below), make decisions about legal unchangeability of sex at the time of birth (see above) or for that matter to lift the ban on changes in the area of the City Park recently imposed by the capital.

Illiberal economic protection action plan: taking away the vehicle tax and development funds, free parking

On April 5 the government announced that as part of its economic protection action plan it would take away all of the income of local governments deriving from the vehicle tax for the benefit of the "Epidemic Defense Fund". 60% of the vehicle tax was already part of the central budget, Government decree no. 92/2020 (IV. 6.) took away the remaining 40% from local governments, which represents a significant loss of income especially for the district local governments in Budapest, while it clearly puts smaller settlements into an impossible financial situation (in their case the vehicle tax practically meant the only source of income). Government decree no. 87/2020. IV.5 on the "different rules of paying parking fees during the state of emergency" was published in the *Hungarian Official Gazette* on April 5; based on this, until the end of the state of emergency parking in public areas became free all over the country. This stipulation punishes specifically the capital and the local governments of the inner city, which are all led by opposition parties (with the exception of district V). According to economic reports every working day when no parking fee has to be paid represents a loss of 67 million Forints for the districts of the capital. Above all this, in a discriminative manner the government withdrew already awarded development funds in the middle of the pandemic only from local governments lead by the opposition (achieving spectacular success in the October 2019 elections). On May 7, András Pikó, the opposition mayor of District VIII published the letter written by the Ministry of the Interior, which states it factually that with reference to the pandemic the government takes back the more than one billion Forint development grant already awarded to the district before. The government took away HUF 400 million the same way from the local government of Ferencváros, also led by the opposition.

Creation of "special economic zones"

Besides the vehicle taxes taken away, the suspended parking fees and the development funds taken away in a discriminative manner, the local governments also need to cope with the significant decrease in the local business taxes due to the economic downturn caused by the

virus. Yet, on April 17 Government decree no. 136/2020 (IV.) 17.) was published in the *Hungarian Official Gazette*, which declared a section of the territory of Göd a "special economic zone". Göd (with an opposition mayor since last fall) is home to Samsung's battery factory, which is obviously a major taxpayer and the residents are often protesting against its expansion. According to the decree, from this point on the county general assembly decides on the tax to be paid by the factory as well as disposes of the incoming tax revenue, while the county government may decide on the possible extension of the factory without the local government. Turning an area into an "economic zone" in Göd is not an exceptional "emergency" measure, the creation of a "special economic zone" resulting in further curbing the income of local governments and their economic autonomy was made possible by Government decree no.135/2020. (IV. 17.) until the end of the state of emergency, and according to bill no. T/10527. submitted on May 12 and adopted on June 16 they may be created anytime in the future. Based on the act, the government may declare investments with a cost of at least HUF 5 billion creating and keeping jobs as special economic zones. As in line with the regulation in a special economic zone some of the tasks and competences of local governments are taken over by county governments, from now on the government may put its hands on taxes that had so far been paid by bigger companies to the local governments through the county governments which are headed by people from FIDESZ without exception.

- **Increasing the vulnerability of culture and science, further fattening of the clientele**

On May 19, the government majority of the Parliament adopted the bill which ends the civil servant status of cultural workers as of November 1. As a result of this step implemented in the midst of the pandemic, the civil servants working in cultural life (archivists, librarians, those working in museums, etc.) will in the future be "protected" by the Labor Code, losing such benefits as longer dismissal periods, higher severance pay, more additional leave, job offer obligations and other dismissal restrictions that would otherwise protect civil servants.
During the state of emergency, however, it was not only the cultural workers whose vulnerability from the government increased. In one of the most critical periods of the fight against the pandemic the government majority also decided on the subordination of local government run theaters to supervisory committees under government influence. In line with bill no. T/9934. also adopted on May 19 and already mentioned above, three of the five members of the supervisory committee of theaters can be appointed and recalled by the minister at any time.
The scope of measures taken during the state of emergency also included the further reduction of the public funding of universities already hard hit by deductions. News about the government taking away money from universities appeared at the end of April. At Eötvös Lóránd University (ELTE), for example, a hiring freeze was introduced: based on the instructions of the university's chancellor no new civil servant status may be established, fixed-term civil service positions (due to the lack of internal funds) may only be extended for a

maximum of two months and fixed-term positions cannot be transformed into a position for an indefinite term. In the case of ELTE austerity measures amount to HUF 860 million, which is not even a drastic one in view of the fact that according to the news HUF 1.9 billion is taken away from the University of Pécs with reference to the pandemic and a similar deduction may hit the University of Szeged also.

There are obviously logical reasons as to why the government would regroup certain state funds for the fight against the disease at the time of the outbreak of a pandemic, however, austerity measures hitting cultural life and universities are not compatible with the HUF 170 billion fund provided for hotel development outside the capital, the freely transferred real estates given to the foundation of Mária Schmidt, the support given to the hunting exhibition of Zsolt Semjén amounting to HUF 1.67 billion, and the fact that in the first one and a half months of the state of emergency the government spent HUF 205 million every day (!) on sports development or that it put its hands on ports at Lake Balaton primarily owned by local governments on the shore during this critical period.

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Viktor Orbán talked about returning the authority granted to him by the Parliament for the first time at a press conference in Belgrade on May 15, 2020. At the same time, he also foreshadowed the termination of the state of emergency, the special legal order. However, as it could be expected, the special legal order only ended formally as the government preserved the most important elements of the rule by decree under the pretext of epidemiological preparedness. On June 16, 2020 the Parliament adopted two bills. In one of them, it called upon the government to terminate the state of emergency, with the government taking the necessary measures in this respect in its Government decree no. 282/2020. (VI. 17.) the next day already. Although government communication emphasized from the beginning that the Parliament will decide on ending the special legal order, based on the Fundamental Law it was clear that in this respect the government can decide on its own. The related law only served the purpose of maintaining the appearance that the representative body of the people also had a role in the exercise of political power. The other, so called Transitional Act (Act LVIII of 2020) adopted by the Parliament also on June 16, 2020 includes the regulations for the period after the state of emergency. These stipulations perpetuate the tools of exercising power during a period of a special legal order, thus used only exceptionally and temporarily. In the case of a special legal order, rapid and effective crisis management may justify the *simplification* of decision-making processes and the broader *restriction* of individual freedom. The Transitional Act grants this opportunity now at the time of normal legal order as well: with the introduction of epidemiological preparedness and the significant revision of the rules of healthcare emergencies the government may now take *special measures* without ordering a special legal order and may

make decisions by decree about the restriction of individual freedom, even without the cooperation of the Parliament.

While according to Article 53 Section (3) of the Fundamental Law decrees adopted during the state of emergency may remain effective beyond 15 days only with the approval of the Parliament, during the time of epidemiological preparedness, the declaration of which was decided by the government simultaneously with the termination of the state of emergency on June 17, 2020 [Government decree 283/2020. (VI. 17.)], the Parliament has no substantial powers whatsoever to control the rule by decree. This is because the declaration of epidemiological preparedness is the decision of the government upon the proposal of the minister based on the recommendation of the chief medical officer. As a general rule, the epidemiological preparedness lasts for 6 months, however, it may be extended by the Government; this also means that the rule by decree may be maintained without any parliamentary control for several months.
In parliamentary government systems the autonomy of parliaments is not unlimited under the rule of law either, as the parliament and the government are intertwined and in most cases act in political unison. The independence of the Hungarian Parliament, however, continued to decrease as a result of democratic retrogression since 2010, thus it is not an unfounded supposition that we have been living in such a political system for years which in terms of its content resembles some kind of a rule by decree. In the Parliament, due to the long-lasting two-thirds majority of FIDESZ, what happens is always what the government wants: the institution of political deliberation barely operates, there are no occasional parliamentary committees of inquiry whatsoever, and the marginal position of the permanent committees can best be illustrated by the paralysis of the National Security Committee operating with a chair coming traditionally from the opposition.

So why does it matter that the recently adopted Transitional Act makes rule by decree possible formally as well in the upcoming period? If decisions related to the pandemic continue to fall within the competence of the Parliament, then several regulations affecting fundamental rights can only be adopted by the Parliament with a two-third majority. The two-third majority of the current government is rather fragile, the absence of just one MP position results in the ending of the two-third majority, which makes the adoption of numerous measures more difficult. At the same time, the technical rules characteristic of legislation do not hinder the acceptance of decrees either (the latter meaning the conditions of validity of the laws and in a given case, whatever the Constitutional Court is like, they may also be subject to constitutional review). All these barriers of power are abolished by the Transitional Act when it transfers a wide scope of important decisions from the Parliament to the government.

And what are these important decisions? In the case of a risk of an epidemic, the Health Act has enabled the adoption of measures restricting a broad range of fundamental rights before as well. During epidemiological preparedness taking the place of the state of emergency the scope of action by the government is extended further and it will have the opportunity to also take measures that could hardly be related to the pandemic. The stipulations included in the Transitional Act represent the "survival" of restrictions of fundamental rights ordered during the state of emergency. From the perspective of fundamental rights, the practically unlimited eligibility of the operational group to request data is especially worrisome, which also extends to data in the Electronic Health Service Space and other personal information. The hospital commander system also remains in effect, thus the healthcare institutions will continue to operate under the management of armed forces. Moreover, the government has the opportunity to determine the order of using healthcare services, which may affect patients' rights.

Although certain measures, including the restriction and prohibition of events and activities may be justified by the epidemiological situation, based on the experience of the past few years we can hardly hope that this increased power would not be used by the government to strengthen its ambitions of power.

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This concludes our coronavirus stocktaking. Now, reaching the end of the list what comes to our mind is that in Hungary time stands still. And so let us also close this analysis with the famous sentence of the cult movie with the same title: "Alright, so we will live here."